UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit No. O2546	§	
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Issued to ETC Texas Pipeline, Ltd	§	Permit No. O2546
	§	
Issued by the Texas Commission on Environmental Quality	§	
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PETITION TO OBJECT TO TITLE V PERMIT NO. O2546 ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Pursuant to section 42 U.S.C. § 7661d(b)(2), the Environmental Integrity Project, Sierra Club, and Texas Campaign for the Environment ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Proposed Federal Operating Permit No. O2546 ("Proposed Permit") issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") authorizing operation of the Waha Gas Plant, located in Pecos County, Texas.

I. PETITIONERS

The Environmental Integrity Project ("EIP") is a non-profit, non-partisan watchdog organization that advocates for effective enforcement of environmental laws. EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce and implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations accountable for failing to enforce or comply with environmental laws; and (3) to help communities obtain protections guaranteed by environmental laws. EIP has offices and programs in Austin, Texas and Washington, D.C.

The Sierra Club is a national nonprofit organization with 67 chapters and over 635,000 members dedicated to exploring, enjoying, and protecting the wild places of earth; to practicing and promoting the responsible use of earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Lone Star Chapter of the Sierra Club has members who live, work, and/or recreate in areas affected by air pollution from the Waha Gas Plant.

Texas Campaign for the Environment is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their community, and the environment. Texas Campaign for the Environment works to promote the strict enforcement of anti-pollution laws designed to stop or clean up pollution. Texas Campaign for the Environment has members who live, work, and/or recreate in areas affected by air pollution from the Waha Gas Plant.

II. PROCEDURAL BACKGROUND

This petition addresses the TCEQ's renewal of Permit No. O2546 authorizing operation of the Waha Gas Plant. The Waha Gas Plant is a major source of criteria air pollutants located in Pecos County, Texas.

ETC Texas Pipeline Ltd. ("ETC") filed its application to renew Permit No. O2546 on October 17, 2018. The Executive Director concluded his technical review of ETC's application on April 24, 2019. The Executive Director proposed to approve ETC's application and issued Draft Permit No. O2546, notice of which was published on May 16, 2019. Environmental Integrity Project and Neta Rhyne timely-filed comments with the TCEQ identifying deficiencies in the Draft Permit. (Exhibit A), Public Comments on Draft Permit No. O2546 ("Public Comments").

On November 21, 2019, the TCEQ's Executive Director issued notice of Proposed Permit No. O2546 along with his response to public comments on the Draft Permit. (Exhibit B), Notice of Proposed Permit and the Executive Director's Response to Public Comment ("Response to

Comments"); (Exhibit C), Proposed Permit; (Exhibit D), Statement of Basis, Permit No. O2546. The Executive Director made limited revisions to the Draft Permit in response to the Public Comments that did not resolve the issues discussed in Section IV of this petition below.

The Executive Director's Response to Comments appears to include at least one material error. According to the Response to Comments:

> ETC has made the following change to the permit application resulting in changes to the draft permit and statement of basis listed below:
>
> 1. Added a "PBR Supplemental Table" to the permit application to list all the PBRs applicable to the site, which include registered PBRs, claimed PBRs, and claimed PBRs for insignificant emission units. In addition, this table includes PBRs in §§ 106.262 (9/4/2000), 106.262 (11/1/2003), 106.371 (3/14/1997), 106.454 (11/1/2001), 106.472 [(] 3/14/1997), and 106.473 (9/4/2000) that are listed by the commenter, even though these PBRs may be the only requirements applicable to an emission unit.

Response to Comments at Response 2, 3A and 3B.[1]

The PBR Supplemental Table, attached as (Exhibit E) to this Petition, does not list *any* of the specific PBRs listed above. Petitioners contacted the permit engineer assigned to this permit renewal asking whether the Response to Comments erroneously listed these PBRs or if the PBR Supplemental Table is incomplete. (Exhibit F), Email to Brandon Marsh. The permit engineer's response acknowledged receipt of Petitioners' email, but failed to include any information responding to Petitioners' question. (Exhibit G), Email from Brandon Marsh. Because the Executive Director failed to clarify whether the PBR Supplemental Table, or his Response to Comments, or both contain errors, Petitioners assume that the PBRs identified by the Response to Comments are applicable requirements and that the PBR Supplemental Table is incomplete.

[1] The Executive Director's unfortunate practice of issuing response to comments documents with unnumbered pages makes it necessary to reference the response number rather than the page number.

EPA's 45-day review period for the Proposed Permit began on November 26, 2019 and ended on January 1, 2019. Because the Administrator did not object to the Proposed Permit during his 45-day review period, members of the public have 60-days from the close of the review period to petition the Administrator to object to the Proposed Permit. This petition for objection is timely filed through EPA's Central Data Exchange on March 10, 2020. *See also,* Response to Comments (listing March 10, 2020 as the Petition deadline). Copies of the petition will be sent to the Executive Director and ETC.

III. LEGAL REQUIREMENTS

Title V permits are the primary method for enforcing and assuring compliance with the Clean Air Act's pollution control requirements for major sources of air pollution. *Operating Permit Program,* 57 Fed. Reg. 32,250, 32,258 (July 21, 1992). Prior to enactment of the Title V permitting program, regulators, operators, and members of the public had difficulty determining which requirements applied to each major source and whether sources were complying with applicable requirements. This was a problem because applicable requirements for each major source were spread across many different rules and orders, some of which did not make it clear how general requirements applied to specific sources.

The Title V permitting program was created to improve compliance with and to facilitate enforcement of Clean Air Act requirements by requiring each major source to obtain an operating permit that (1) lists all applicable federally-enforceable requirements, (2) contains enough information for readers to determine how applicable requirements apply to units at the permitted source, and (3) establishes monitoring requirements that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular

source."); *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits . . . . It also mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions").

The Title V permitting program provides a process for stakeholders to resolve disputes about which requirements should apply to each major source of air pollution outside of the enforcement context. 57 Fed. Reg. 32,266 ("Under the [Title V] permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act's requirements apply to the particular source will be resolved during the permit issuance and subsequent review process."). Accordingly, federal courts do not generally second-guess Title V permitting decisions made by state permitting agencies and will not enforce otherwise-applicable requirements that have been omitted from or displaced by conditions in a Title V permit. *See,* 42 U.S.C. § 7607(b)(2); *see also, Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008) (holding that enforcement of New Source Performance Standard omitted from a source's Title V permit was barred by 42 U.S.C. § 7607(b)(2)). Because courts rely on Title V permits to determine which requirements may be enforced and which requirements may not be enforced against each major source, state-permitting agencies and EPA must exercise care to ensure that each Title V permit includes a clear, complete, and accurate account of the requirements that apply to the permitted source.

The Act requires the Administrator to object to a state-issued Title V permit if he determines that it fails to include and assure compliance with all applicable requirements. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If the Administrator does not object to a Title V permit, "any person may petition the Administrator within 60 days after the expiration of the

Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the . . . [Clean Air Act]." 42 U.S.C. § 7661d(b)(2); *see also,* 40 C.F.R. § 70.8(c)(1). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2).

IV. GROUNDS FOR OBJECTION

A. The Proposed Permit Must Include a Schedule Addressing Noncompliance at the Waha Gas Plant.

1. Specific Grounds for Objection, Including Citation to Permit Term

Texas Health and Safety Code § 382.0215, which is part of the Texas State Implementation Plan ("SIP") provides:

> (a) Except as authorized by a commission rule or order, a person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity that causes or contributes to, or that will cause or contribute to, air pollution.
>
> (b) A person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.[2]

The Texas Health and Safety Code defines "emissions event" to mean "an upset event, or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in the unauthorized emissions of air contaminants from one or more emissions points at a regulated entity." *Id*. at § 382.0215(a)(1). This definition is substantially similar to that found at 30 Tex.

[2] This language was initially established through the amendment of the Texas Clean Air Act, Article 4477-5, in 1972, which was approved into the SIP. 40 C.F.R. § 52.2270(e) (listing Texas Clean Air Act (Article 4477-5 as part of the SIP); S.B. 48, Subchapter D, Section 4.01, available electronically at: https://www.tceq.texas.gov/assets/public/implementation/air/sip/sipdocs/1972-SIP/1972_sip_section_v.pdf . This provision remains part of the SIP, though it has been renumbered by the Texas Legislature.

Admin. Code § 101.1(28), which is part of the Texas SIP. 40 C.F.R. § 52.2270(c). Because emissions events results in the unauthorized emission of air contaminants, they, by definition, constitute violations of Texas Clean Air Act § § 382.0215.

The Proposed Permit incorporates by reference 74857. Proposed Permit at 42. General Condition No. 8 of Permit No. 74857 provides that: "total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled 'Emission Sources--Maximum Allowable Emission Rates.'" (Exhibit H), Permit No. 74857. Special Condition No. 7(C) of Permit No. 74857 provides that "activities" at ETC's acid gas flare (EPN 70) "are limited to 355 hours per year." The Maximum Allowable Emission Rates table of Permit No. 74857 limits annual SO_2 emissions from ETC's acid gas flare to 174.92 tons.

Reports to the TCEQ made by ETC establish that the Waha Gas Plant has violated the Texas Clean Air Act by emitting more than 100 tons of unauthorized SO_2 during emissions events and unauthorized maintenance each year, since 2012. (Exhibit I), Spreadsheet compiling ETC reports to the TCEQ STEERS system 2017-2020; Public Comments, Attachments 3-10.

Table 1: Unauthorized SO_2 Emissions from the Waha Gas Plant by Year

Year	**Unauthorized SO_2 (tons)[3]**
2019	237
2018	337
2017	101
2016	259
2015	224
2014	184
2013	475
2012	736

[3] Totals from 2018-2019 sum events reported to the TCEQ's State of Texas Emission Event Reporting System ("STEERS"). Public Comments, Attachments 3 and 4 summarize these events. Totals from 2012-2017 are taken from the TCEQ's Emissions Inventory Summaries. Public Comments, Attachments 5-10.

All SO_2 released during these events was emitted from the Waha Gas Plant's acid gas flare. *See, e.g.,* Exhibit I (identifying the Acid Gas Flare, EPN 70, as emitting unit for each reported event). Permit No. 74857 limits SO_2 emissions from the acid gas flare to 174.92 tons per year. Thus, this same evidence demonstrates that ETC violated that emission limit in 2012, 2013, 2014, 2015, 2016, 2018, and 2019.

ETC's reports to the TCEQ specify the duration that ETC operated its acid gas flare flaring during each unauthorized event. In 2018, ETC operated its acid gas flare for 1,253 hours during emissions events and unauthorized maintenance. *Id*. (total calculated using dates and times in STEERs reports). In 2019, ETC operated its acid gas flare for 551 hours during emissions events and unauthorized maintenance. *Id*. This establishes that ETC has repeatedly violated the 335 hour per year operating limit for the acid gas flare established by Permit No. 74857, Special Condition No. 7(C).

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must establish a schedule for compliance addressing ongoing source non-compliance with applicable requirements at the time a permit is issued. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(c)(3); 30 Tex. Admin. Code § 122.142(d).

3. Inadequacy of the Permit Term

The Proposed Permit is deficient because it does not establish a schedule for ETC to come into compliance with the flare SO_2 emission limit and annual operating time limit in Permit No. 74857 and to eliminate unauthorized flaring during repeated emission events and unauthorized maintenance, which violates the Texas Clean Air Act's prohibition on unauthorized emissions.

4. Issues Raised in Public Comments

This issue was raised on pages 1-2 of the Public Comments. This petition includes additional evidence of unauthorized emissions and flaring during emission events after the close

of the public comment period. This evidence may presented for the first time in this petition, because it became available only after the close of the public comment period. 42 U.S.C. § 7661d(b)(2).

5. Analysis of the State's Response

The Executive Director does not contest the sufficiency or accuracy of any the evidence and analysis presented by the Public Comments to establish that units at the Waha Gas Plant are not in compliance with applicable requirements, nor does he deny that ETC has regularly and repeatedly violated the Texas SIP and Permit No. 74857 since at least 2012. Nor does the Executive Director dispute that the relevant limits in Permit No. 74857 or the prohibition on unauthorized emissions established by the Texas Clean Air Act are applicable requirements for purposes of his Title V review. This is enough to establish that the Executive Director's Response to Comments fails to rebut Petitioners' demonstration on noncompliance.

Instead of addressing the evidence and analysis presented in the Public Comments, the Executive Director suggests that he relies on different kinds of information about an applicant's compliance status when he conducts a Title V permit renewal:

> Per 30 TAC § 122.142(d) (Permit Content Requirements), for any emissions units not in compliance with the applicable requirements at the time of renewal application, the permit holder is required to submit a compliance schedule consistent with § 122.132(d)(4)(C). An OP-ACPS (Application Compliance Plan and Schedule) form contained in a renewal application received by TCEQ on 10/17/2018 indicated that all units were in compliance with the applicable requirements.

And

> Renewal … of Title V permits issued by TCEQ is based on CH [or "Compliance History"] ratings and classification for the site. Based on the CH data reported for the September 1, 2013, through August 31, 2018 time period, the site has a "satisfactory" classification.

Response to Comments at Response 1.

Even if one grants all this as true, the Executive Director's response fails to rebut Petitioners' demonstration of deficiency. While the Executive Director may choose to rely on the kinds of information identified in his Response to Comments as he conducts his technical review of a renewal application, that does not mean he has discretion to disregard uncontested and conclusive evidence of noncompliance when it is brought to his attention in public comments. The Executive Director's response, moreover, is not accurate. It misstates applicable law as well as his own practice in past permitting projects.

For example, the Executive Director's suggests that he should only consider noncompliance at the Waha Gas Plant occurring prior to the date upon which ETC submitted its renewal application. The rule cited in the Response to Comments does not support this claim. Rather, the rule provides that:

> For emission units not in compliance with the applicable requirements *at the time of ... renewal*, the permit shall contain the following:
>
> (1) a compliance schedule or a reference to a compliance schedule consistent with § 122.132(d)(4)(C) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits)[.]

30 Tex. Admin. Code § 122.142(d) (emphasis added).

Indeed, Texas's Title V regulations specifically require applicants to update their applications after the Executive Director initiates his technical review of an application, as necessary to address any applicable requirements. 30 Tex. Admin. Code § 122.136(c). Thus, ETC's submission of its renewal application does not render evidence of ongoing noncompliance occurring after the date of that submission irrelevant.[4]

[4] Even if the Executive Director's reading of § 122.142(d) is reasonable, the Public Comments present uncontested evidence establishing ongoing noncompliance prior to the date on which ETC submitted its application.

The Executive Director's further suggestion that he may rely on the certification of compliance with applicable requirements contained in ETC's renewal application to disregard the undisputed evidence of ongoing noncompliance at the Waha Gas Plant is also unsupported and unreasonable. The compliance certification is not the only portion of a Title V permit application that must be certified as accurate by a responsible official. Indeed, Texas's Title V regulations require that the *entirety of each renewal application* to be certified as accurate and complete by a responsible official. 30 Tex. Admin. Code § 122.165(a)(4). Thus, if an applicant's mere certification of an application representation were sufficient to establish the accuracy of that representation, there would be no point at all to the public participation process, or, indeed, to the TCEQ's own review process. That is absurd. The Executive Director may not rely on ETC's certification of compliance to dismiss, out of hand, undisputed evidence of ongoing noncompliance at the Waha Gas Plant.

The Executive Director's final suggestion that "[r]enewal … of Title V permits issued by TCEQ is based on CH [or "Compliance History"] ratings and classification for the site" also fails to justify his decision to issue the Proposed Permit without establishing a compliance schedule. It is true that Texas's Title V rules extend the requirement to conduct a compliance history review under Chapter 60 of the Texas Administrative Code to include Title V permit renewals, 30 Tex. Admin. Code § 122.162, that obligation is in addition to and does not displace the separate requirement to establish a Title V compliance schedule to address noncompliance at the time a Title V permit is renewed. 30 Tex. Admin. Code § 122.142(d). This fact is demonstrated both by the separate provisions in Chapter 60 establishing the uses of compliance history ratings, 30 Tex. Admin. Code § 60.3, and by the Executive Director's past decisions to establish a compliance schedule in other Title V permits for sources with a "satisfactory" CH rating. *See, e.g.,* (Exhibit

J), Technical Review Document for Permit No. O1375, Project No. 28503 (explaining that the project established a compliance schedule and indicating that the source's CH rating is "satisfactory.").[5]

B. The Proposed Permit Fails to Identify Any Emission Unit(s) Authorized by One PBR and Three Standard Exemptions Incorporated as Applicable Requirements.

1. Specific Grounds for Objection, Including Citation to Permit Term

Proposed Permit, Special Condition No. 10 states:

> Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule (including the permits by rule identified in the PBR Supplemental Tables in the application), standard permits, flexible permits, special permits, permits for existing facilities including Voluntary Emissions Reduction Permits and Electric Generating Facility Permits issued under 30 TAC Chapter 116, Subchapter I, or special exemptions referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements
>
> B. Shall be located with this operating permit
>
> C. Are not eligible for a permit shield

The Proposed Permit's New Source Review Authorization References attachment identifies the PBR at 30 Tex. Admin. Code § 106.492 (9/4/2000) and Standard Exemptions 66 (11/5/1986), 66 (8/30/1998), and 66 (7/20/1992) as applicable requirements for the Waha Gas Plant. Proposed Permit at 42.

The Proposed Permit's New Source Review Authorizations References by Emissions Unit table identifies units subject to requirements in incorporated PBRs and standard exemptions. *Id.* at 43-44. The Proposed Permit, however, does not identify any unit or units subject to

[5] This Exhibit is not necessary to establish the alleged deficiency and is not intended to supplement evidence presented in the Public Comments. Instead, this evidence is offered for the sole purpose of rebutting the sufficiency of the Executive Director's response to comments.

requirements in the PBR at 106.492 (9/4/2000) or Standard Exemptions 66 (11/5/1986), 66 (8/30/1998), and 66 (7/20/1992), or indicate that these requirements apply site-wide.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a) and (c). "Applicable requirements" include emission limits for PBRs and standard exemptions claimed to authorize projects at a Title V source. 30 Tex. Admin. Code § 122.10(2)(H).

3. Inadequacy of the Permit Term

Each Title V permit must include terms and conditions sufficient to assure compliance with applicable requirements. 42 U.S.C. § 7661c(a). The Proposed Permit fails to comply with this requirement because it fails to identify any units subject to the following incorporated PBR and standard exemptions: 106.492 (9/4/2000), 66 (11/5/1986), 66 (8/30/1988), 66 (7/20/1992). Because the Proposed Permit fails to identify the emission units authorized by and subject to the requirements in these claimed rules, it is completely unclear as to how the PBR and standard exemptions apply to emission units at the Waha Gas Plant and thereby undermines the enforceability of PBR and standard exemption requirements. *Objection to Title V Permit No. O2164, Chevron Phillips Chemical Company, Philtex Plant* (Aug. 6, 2010) at ¶7 (draft permit fails to meet 40 C.F.R. § 70.6(a)(1) and (3) because it does not list any emission units authorized under specified PBRs); *In the Matter of Shell Chemical LP and Shell Oil Co*, Order on Petition Nos. VI-2014-04 and VI-2014-05, at 11-15 (Sep. 24, 2015). Moreover, even if an interested party is able to determine which emission units *should* be subject to one or more of these PBRs and standard exemptions, a court is unlikely to enforce these requirements, because the Proposed Permit fails to identify them as applicable for any specific emission unit or units at the Waha Gas Plant. *See, United States v. EME Homer City Generation,* 727 F.3d 274, 300 (3d Cir. 2013) (explaining that

court lacks jurisdiction to enforce requirements improperly omitted from a Title V permit). Because this is so, the Proposed Permit fails to identify and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a). *See also*, (Exhibit K), Objection to Title V Permit No. O2269 ("Exxon Order") at 5 (objecting to Title V permit's failure to identify units authorized by incorporated PBRs).

4. Issues Raised in Public Comments

This issue was raised on pages 2-3 of the Public Comments.

5. Analysis of the State's Response

The Executive Director's response acknowledges this issue, but does not directly explain why the Proposed Permit need not identify units subject to the PBR and standard exemptions listed above:

> The ED disagrees with the commenter's assertion "since the following PBRs and Standard Exemptions: 106.492 (9/4/2000), 66 (11/5/1986), 66 (8/30/1988), 66 (7/20/1992) fail to identify any units, it undermines enforceability of these PBRs and Standard Exemptions". PBRs, Standard Exemptions (SEs) and Standard Permits (SPs) may be used under 30 TAC §§ 106 and 116 to authorize specific emission units, process areas or sitewide facilities (e.g., planned Maintenance, startup and shutdown (MSS)). Practical enforceability of Texas' general requirements for PBRs and SPs are approved as part of the Texas SIP. In addition, as noted below in the response to this comment, the Draft Permit includes a recordkeeping requirement for emission units authorized by PBR or Standard Exemption. These records are to be made available to regulatory agencies upon request. These same records are to be used in the deviation and compliance certification reporting requirements contained in the permit and referenced in Response to Comment 1.

Response to Comments at Response 2, 3A and 3B.

The Executive Director also indicates that several changes were made to the Proposed Permit to address other concerns in the Public Comments related to PBRs, but none of these changes addresses Petitioners' demonstration that the Proposed Permit is deficient because it fails to identify units subject to requirements in incorporated PBRs and standard exemptions. *Id*.

The Executive Director's claim that the practical enforceability of PBRs and standard exemptions is "approved as part of the SIP" has no bearing on Petitioners' demonstration that the Proposed Permit fails to include information necessary to determine how applicable requirements in PBRs and standard exemptions apply to units at the Waha Gas Plant. That certain provisions incorporated by the Proposed Permit are part of the Texas SIP has no bearing on the separate question of whether the Proposed Permit contains conditions necessary to assure compliance with applicable requirements. 42 U.S.C. § 7661c(a).

C. The Permit Fails to Establish Monitoring, Testing, and Recordkeeping Provisions that Assure Compliance with PBR and Standard Exemption Requirements.

1. Specific Grounds for Objection, Including Citation to Permit Term

Proposed Permit, Special Condition No. 10 provides that NSR permits—including PBRs standard exemptions, and standard permits—listed in the New Source Authorization References attachment are incorporated by reference into the Proposed Permit as applicable requirements. Incorporated PBRs, standard exemptions and standard establish emission limits and operating requirements that apply for equipment and projects at the Waha Gas Plant. Texas's general PBR rule at 30 Tex. Admin. Code § 106.4(a) also establishes emission limits that apply to the Waha Gas Plant.

The Proposed Permit's New Source Review Authorization References attachment identifies the following PBRs, standard exemption, and standard permit as applicable requirements for the Waha Gas Plant: 106.183 (9/4/2000), 106.359 (9/10/2013), 106.492 (9/4/2000), 66 (11/5/1986),[6] 66 (8/30/1988),[7] and 66 (7/20/1992).[8] Proposed Permit at 42.

[6] This outdated standard exemption is available electronically at: https://www.tceq.texas.gov/permitting/air/permitbyrule/historical_rules/oldselist/se_apr86/62-72.html
[7] This outdated standard exemption is available electronically at: https://www.tceq.texas.gov/permitting/air/permitbyrule/historical_rules/oldselist/se_jul88/62-72.html
[8] This outdated standard exemption is available electronically at: https://www.tceq.texas.gov/permitting/air/permitbyrule/historical_rules/oldselist/se_jun92/62-72.html

The Proposed Permit includes the following recordkeeping requirement for emission units authorized by PBR or standard exemption:

> The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a permit by rule (PBR) or Standard Permit listed in the New Source Review Authorizations attachment. The records shall yield reliable data from the relevant time period that are representative of the emission unit's compliance with the PBR or Standard Permit. These records may include, but are not limited to, production capacity and throughput, hours of operation, safety data sheets (SDS), chemical composition of raw materials, speciation of air contaminant data, engineering calculations, maintenance records, fugitive data, performance tests, capture/control device efficiencies, direct pollutant monitoring (CEMS, COMS, or PEMS), or control device parametric monitoring. These records shall be made readily accessible and available as required by 30 TAC § 122.144. Any monitoring or recordkeeping data indicating noncompliance with the PBR or Standard Permit shall be considered and reported as a deviation according to 30 TAC § 122.145 (Reporting Terms and Conditions).

Proposed Permit, Special Condition No. 12.

The Proposed Permit also incorporates by reference "the general requirements of 30 TAC Chapter 106, subchapter A or the general requirements, if any, in effect at the time of the claim of any PBR." *Id*. at Special Condition No. 11. While 30 Tex. Admin. Code § 106.8 establishes general recordkeeping requirements consistent with Proposed Permit, Special Condition No. 12, the rule does not specify any particular monitoring or testing requirements that assure compliance with applicable PBR and standard exemption emission limits and operating requirements incorporated into the Proposed Permit.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1); In the Matter of Wheelabrator Baltimore ("Wheelabrator Order"), Permit No. 24-510-01886 at 10 (April 14, 2010). Emission limits in NSR permits, including PBRs and

standard exemptions, incorporated by reference into the Proposed Permit are applicable requirements. 40 C.F.R. § 70.2; Proposed Permit, Special Condition No. 10. The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.5(a)(5); In the Matter of United States Steel, Granite City Works ("Granite City I Order"), Order on Petition No. V-2009-03 at 7-8 (January 31, 2011).

As explained below, the Proposed Permit is deficient because (1) it fails to specify monitoring, testing, and recordkeeping requirements that assure compliance with emission limits and operating requirements in incorporated PBRs and standard exemptions; and (2) the permit record does not contain a reasoned justification for the Executive Director's determination that monitoring, testing, and recordkeeping requirements in the Proposed Permit assure compliance with emission limits established by ETC's PBRs and standard exemptions.

3. Inadequacy of the Permit Term

The Proposed Permit is deficient, because it fails to establish monitoring, testing, and recordkeeping requirements that assure compliance with PBRs and standard exemptions that it incorporates by reference.

ETC has used the PBR at 106.183 to authorize boilers, heaters, drying or curing ovens, furnaces, and/or other combustion units. It establishes total sulfur fuel content limits, 30 Tex. Admin. Code § 106.183(2)(C), and provides that "[a]ll gas fired heaters and boilers with a heat input greater than ten million Btu per hour … shall be designed such that the emissions of nitrogen oxides shall not exceed 0.1 pounds per million Btu heat input." *Id.* § 106.183(4). This PBR fails to establish any monitoring or testing requirements to ensure compliance with the limits and operating requirements it establishes or the emission limits established by the general PBR rule at 106.4.

ETC has used the PBR at 106.359 to authorize planned MSS activities at the Waha Gas Plant. This PBR covers storage tank maintenance but fails to establish any monitoring or testing requirements to ensure compliance with the general PBR rule emission limits.

ETC has used the PBR at 106.492 to authorize one or more flares at the Waha Gas Plant. This PBR establishes various design and operating requirements, but does not include any monitoring or testing requirements to assure compliance the general PBR rule emission limits.

ETC has claimed several version of Standard Exemption 66 for oil and gas production facilities. These standard exemptions establish emission limits for NO_x, SO_2, CO, and other sulfur compounds. The rules, however, do not include any monitoring or testing requirements to assure compliance with these emission limits.

Neither the Proposed Permit nor the PBR or standard exemption rules specified above, and listed in the Proposed Permit's New Source Review Authorization References attachment, specify the monitoring or testing methods that assure compliance with applicable PBR and standard exemption emission limits and operating requirements incorporated into the Proposed Permit. While the Proposed Permit does identify the Commission's general PBR rules at 30 Tex. Admin. Code, Subchapter A as applicable requirements, and includes Special Condition Nos. 11 and 12, which are related to PBR recordkeeping, these provisions do not specify which monitoring or testing methods—*if any*—are necessary to assure compliance with PBR and standard exemption emission limits and operating requirements. Rather, these provisions provide a non-exhaustive menu of options that ETC may pick and choose from, at its discretion, to demonstrate compliance with PBR and standard exemption emission limits and operating requirements. The laundry list of options for monitoring compliance contained in Proposed Permit, Special Condition No. 12 is so vague as to be meaningless.

The Proposed Permit allows ETC to determine which records and monitoring provide sufficiently "reliable data," effectively outsourcing the Executive Director's obligation to specify the monitoring and testing method(s) that will assure compliance with each emission limit or standard established by PBRs and standard exemptions incorporated by reference into the Proposed Permit. This vagueness also prevents EPA and the public from effectively evaluating whether the monitoring or testing methods—if any—that ETC uses to assure compliance with PBR and standard exemption requirements are consistent with Title V. For example, Commenters would likely challenge monitoring that relies upon undefined "engineering calculations" to determine compliance, unless the permit record contained information show that such calculations actually assure compliance with applicable PBR and standard exemption emission limits and operating requirements.

Neither the Proposed Permit, nor the accompanying Statement of Basis provide support for the Executive Director's determination that the Proposed Permit specifies monitoring and testing methods that assure compliance with the above-listed PBR and standard exemption requirements. As explained with specificity above, most of the PBR and standard exemption rules incorporated by the Proposed Permit are completely silent about the kind of monitoring and testing required to assure compliance with applicable limits. Because this is so, the Proposed Permit is deficient. *In the Matter of Motiva Enterprises LLC, Port Arthur Refinery* ("Motiva Order"), Order on Petition No. VI-2016-23 at 24-25 (May 31, 2018) (objecting to permit in case where "Petitioners have demonstrated that . . . [a] particular PBR does not contain any recordkeeping or monitoring requirements itself."); *see also, In the Matter of Wheelabrator Baltimore, L.P.,* Permit No. 24-510-01886, at 10 (April 14, 2010).

4. Issues Raised in Public Comments

This issue was raised on pages 3-6 of the Public Comments.

5. Analysis of the State's Response

The Executive Director disagrees with Petitioners' demonstration that the above-listed PBRs and standard exemptions incorporated by reference into the Proposed Permit fail to specify monitoring and testing requirements that assure compliance with applicable requirements. Response to Comments at Response 2, 3A and 3B. The Executive Director, however, does not explain why Petitioners' demonstration is insufficient to establish that the Proposed Permit is deficient. EPA has already determined that generic provisions, like those found in the Proposed Permit, are not sufficient to assure compliance with PBR requirements. Motiva Order at 24-25.

D. The Proposed Permit Fails to Include Specific Enforceable Terms and Conditions for Applicable NSPS Requirements.

1. Specific Grounds for Objection, Including Citation to Permit Term

The Proposed Permit's Applicable Requirements Summary table contains the following language incorporating applicable requirements in NSPS Subparts Dc and OOOOa:

Units	Emission Limitation, Standard or Equipment Specification Citation	Textual Description	Monitoring And Testing Requirements	Recordkeeping Requirements (30 TAC § 122.144)	Reporting Requirements (30 TAC § 122.145)
FURNACE-1 and STAB-HTR	§ 60.40c(a)	This subpart applies to each steam generating unit constructed, reconstructed, or modified after 6/9/89 and that has a maximum design heat input capacity of 2.9-29 megawatts (MW).	None	§ 60.48c(g)(1) § 60.48c(g)(2) § 60.48c(g)(3) § 60.48c(i)	[G]§ 60.48c(a) § 60.48c(j)
STABFUG	§ 60.5365a The permit holder shall comply with the applicable limitation, standard and/or equipment specification requirements of 40 CFR Part 60, Subpart OOOOa	The permit holder shall comply with the applicable requirements of 40 CFR Part 60, Subpart OOOOa	The permit holder shall comply with the applicable monitoring and testing requirements of 40 CFR Part 60, Subpart OOOOa	The permit holder shall comply with the applicable recordkeeping requirements of 40 CFR Part 60, Subpart OOOOa	The permit holder shall comply with the applicable reporting requirements of 40 CFR Part 60, Subpart OOOOa

Proposed Permit at 21-22, 28-29.

2. Applicable Requirement or Part 70 Requirement Not Met

30 Tex. Admin. Code § 122.142(b)(2)(B) requires Title V permits to include

> the specific regulatory citations in each applicable requirement … identifying the emission limitations and standards; and … the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards … sufficient to ensure compliance with the permit."

40 C.F.R. § 70.6(a)(1) provides that "[e]ach permit issued under this part shall include … [e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance."

3. Inadequacy of the Permit Term

The Proposed Permit's failure to specify the detailed applicability determinations for applicable NSPS Subparts Dc and OOOOa is inconsistent with black-letter requirements in Texas's federally-approved regulations. 30 Tex. Admin. Code § 122.142(b)(2)(B) (requiring Title V permits to include detailed applicability determinations and citations for emission limits, standards, equipment specifications, monitoring, testing, and recordkeeping requirements). Specifically, the Proposed Permit fails to identify which of the many potentially-applicable Subpart Dc provisions establish applicable emission limitations, standards and/or equipment specifications. The Proposed Permit's incorporation of OOOOa requirements is deficient for the same reason and for the additional reason that the Proposed Permit fails to identify which of the various potentially applicable OOOOa monitoring, testing, and recordingkeeping requirements apply to the Waha Gas Plant.

In addition to violating the black letter requirements established by 30 Tex. Admin. Code § 122.142(b)(2)(B), the Proposed Permit's high-level citations to complicated regulatory subparts undermines the enforceability of applicable requirements and violates 40 C.F.R. § 70.6(a). As EPA has explained:

> …it is impossible to determine how the regulation applies to the facility by referring to the section-level citations that are currently provided in the permit. This ambiguity and the applicability questions it creates render the Permit unenforceable as a practical matter. In addition, the lack of detail detracts from the usefulness of the Permit as a compliance tool for the facility.

In the Matter of Tesoro Refining and Marketing Co., Order on Petition No. IX-2004-6 at 9 (March 15, 2005).[9]

4. Issues Raised in Public Comments

This issue was raised on page 6 of the Public Comments.

5. Analysis of the State's Response

The Executive Director provided the following response to Public Comments on this issue:

> It has been a long-standing practice for TCEQ to list high level applicable requirements in the Title V permit's Applicable Requirement Summary when the TCEQ has not developed the Decision Support System (DSS) for certain state and federal applicable requirements. The DSS consists of Requirement Reference Tables (RRT), unit attribute forms and regulatory flowcharts that assist in making applicability determinations which include monitoring/testing, recordkeeping, and reporting requirements. After these documents are developed, detailed citations will be included in the permit with the first permit project submitted that addresses the subject units. ETC is required to keep appropriate records of monitoring/testing and other requirements to certify compliance with 40 CFR Part 60, Subparts Dc and OOOOa [TCEQ assumes that Commenter intended to state that unit STABFUG is subject to 40 CFR Part 60, Subpart OOOOa and not Subpart OOOa]. TCEQ's position is that high level requirements are enforceable as the records will indicate the compliance options and monitoring data that were used to certify compliance with the emission limitations and standards.

Response to Comments at Response 5.

The Executive Director's practice of delaying applicability determinations for effective NSPS requirements until the TCEQ develops a standardized process, complete with flowcharts and unit attribute forms is plainly contrary to law. The effective date of applicable requirements established by 40 C.F.R., Part 60 is determined by the regulations in Part 60 and not the Executive

[9] Available electronically at: https://www.epa.gov/sites/production/files/2015-08/documents/tesoro_decision2004.pdf

Director's schedule for developing materials to standardize the applicability determination process for those requirements. The Proposed Permit is deficient because it does not contain detailed applicability determinations for Subparts Dc and OOOOa as required by 30 Tex. Admin. Code § 122.142(b)(2)(B) and because the permit's high-level citations fail to include and assure compliance with the specific applicable requirements of those subparts, contrary to 40 C.F.R. § 70.6(a).

E. The Proposed Permit's Incorporation of ETC's PBR Registrations is Deficient.

1. Specific Grounds for Objection, Including Citation to Permit Term

Proposed Permit, Special Condition No. 10 provides that:

> Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule (including the permits by rule identified in the PBR Supplemental Tables in the application), standard permits, flexible permits, special permits, permits for existing facilities including Voluntary Emissions Reduction Permits and Electric Generating Facility Permits issued under 30 TAC Chapter 116, Subchapter I, or special exemptions referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements
>
> B. Shall be located with this operating permit
>
> C. Are not eligible for a permit shield

The PBR Supplemental Table referenced by Proposed Permit, Special Condition No. 10 provides that ETC has registered source-specific PBR and standard exemption emission limits, which are reflected in Registration Nos. 53463, 31232, and 25624. PBR Supplemental Table.

The Executive Director's Response to Comments indicates that the PBR Supplemental Table also lists the following PBRs, which establish applicable requirements for the Waha Gas Plant: 106.262 (9/4/2000), 106.262 (11/1/2003), 106.371 (3/14/1997), 106.454 (11/1/2001), 106.472 (3/14/1997), and 106.473 (9/4/2000). Response to Comments at Response 2, 3A and 3B.

The PBR Supplemental Table, however, does not actually list *any* of these PBRs are applicable requirements.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include "[e]mission limitations and standards, including those requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. 40 C.F.R. § 70.6(a).

3. Inadequacy of the Permit Term

The Proposed Permit's incorporation of PBRs listed in the PBR Supplemental Table and the Executive Director's Response to Comments is deficient, because: (1) the language of Proposed Permit, Special Condition No. 10 fails to successfully incorporate PBR registrations listed in the PBR Supplemental Table; and (2) the PBR Supplemental Table fails to list PBRs the Executive Director's Response to Comments lists as applicable requirements.

According to Proposed Permit, Special Condition No. 10, PBRs identified by the PBR Supplemental Table "referenced in the New Source Review Authorization References attachment" are incorporated into the Proposed Permit. Neither the PBR registrations listed in the PBR Supplemental Table, nor the PBRs listed in the Executive Director's Response to Comments are referenced in the New Source Review Authorization Reference attachment. Proposed Permit at 42. Accordingly, these applicable requirements are not actually incorporated into the Proposed Permit and the Proposed Permit is incomplete.

The Executive Director's Response to Comments indicates that the following PBRs establish applicable requirements for the Waha Gas Plant: 106.262 (9/4/2000), 106.262 (11/1/2003), 106.371 (3/14/1997), 106.454 (11/1/2001), 106.472 (3/14/1997), and 106.473 (9/4/2000). Response to Comments at Response 2, 3A and 3B. These PBRs are neither listed in

the New Source Authorization References table, nor in the PBR Supplemental Table identified by Special Condition No. 10. Accordingly, the Proposed Permit is incomplete.

The Proposed Permit's incorporation of the PBR Supplemental Table would still be deficient, even if Special Condition No. 10 successfully incorporated it and the table listed all applicable PBRs for the Waha Gas Plant. This is so, because the Proposed Permit itself must identify the specific permits it incorporates and may not simply incorporate by reference an application document that, in turn, incorporates by reference the applicable permit numbers. While EPA has indicated that Texas may incorporate PBR requirements into Title V permits by reference, it has never approved the practice of incorporating by reference application representations that incorporate PBR requirements by reference. This practice violates both 40 C.F.R. § 70.6(a) and 30 Tex. Admin. Code § 122(b)(2)(B) which require Title V *permits*, rather than applications, to specify the applicable regulatory requirements. It is also inconsistent with EPA's determination that:

> In order for incorporation by reference to be used in a way that fosters public participation and results in a title V permit that assures compliance with the Act, it is important that: (1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and date of the document be included so that there is no ambiguity as to which version of a document is being referenced; and (3) citations, cross references, and incorporations by reference are detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation.

In the Matter of United States Steel Corp., Granite City Works, Response to Petition No. V-2009-03 at 43 (January 31, 2011).

ETC and previous operators of the Waha Gas Plant have submitted many different applications to the TCEQ related to Title V Permit No. 2546. (Exhibit L), IMS Permit Page for Title V Permit No. O2546. The Proposed Permit is deficient, because it fails to indicate which of these many applications contains the PBR Supplemental Table. While Petitioners were able to

find the relevant table, this is only because we were directed to it by the Response to Comments for this specific case. In the future, parties reviewing the Proposed Permit will not necessarily have this information.

4. Issues Raised in Public Comments

This issue was not addressed in the Public Comments, because ETC submitted the PBR Supplemental Table and the Executive Director revised Special Condition No. 10 of the Proposed Permit after the close of the public comment period. 42 U.S.C. § 7661d(b)(2).

5. Analysis of the State's Response

Because this issue is properly raised for the first time in this petition, it was not addressed by the Executive Director's Response to Comments.

V. CONCLUSION

For the foregoing reasons, and as explained the Public Comments, the Proposed Permit is deficient. Accordingly, the Clean Air Act requires the Administrator to object to the Proposed Permit.

Sincerely,

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